



AFL-CIO

AMERICA'S UNIONS

**American Federation
of Labor and
Congress of Industrial
Organizations**

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October 1, 2018

NLRB FOIA Officer
National Labor Relations Board
1015 Half Street, S.E. 4th Floor
Washington, D.C. 20570
Facsimile: (202) 273-FOIA (3642)

Re: Request for Records under FOIA

Dear NLRB FOIA Officer:

In relation to the recently issued Notice of Proposed Rulemaking concerning "The Standard for Determining Joint-Employer Status," 83 Fed. Reg. 46681 (Sept. 14, 2018), the AFL-CIO, a voluntary federal of 55 national and international labor unions, submits the following requests for documents under the Freedom of Information Act (FOIA), 5 U.S.C. § 522. We ask that the following documents be made available no later than November 1, 2018, so that we will have an opportunity to analyze them in time to utilize that analysis in comments on the NPRM that are due on November 13, 2018.

Requests

1. Any form of list of cases pending at the National Labor Relations Board (hereinafter NLRB or Board) or in its regional offices raising the question of whether two or more employers jointly employ a common set of employees, including any of the following information: the name of the cases, the number of the cases, and the names of parties to the cases and their counsel.
2. Any form of list of cases decided by the Board, an administrative law judge, or a regional director or that were the subject of an advice memorandum or decision of the office of appeals, addressing the question of whether two or more employers jointly employ a common set of employees and citing the Board's decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), including any of the following information: the name of the cases, the number of the cases, and the names of parties to the cases and their counsel.

3. Any analysis of the number of NLRB cases in which any party alleged that two or more employers are alleged to be joint employer of a common set of employees before and after the Board's decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015).
4. Any analysis of the types of NLRB cases in which any party alleged that two or more employers are alleged to be joint employer of a common set of employees before and after the Board's decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015).
5. Any analysis of the outcomes of NLRB cases in which any party alleged that two or more employers are alleged to be joint employer of a common set of employees before and after the Board's decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015).
6. Any analysis of the impact of the Board's decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), on collective bargaining.
7. Any analysis of the impact of the Board's decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), on employees' exercise of their rights under Section 7 of the National Labor Relations Act.
8. Any analysis of the impact of the Board's decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), on labor organizations' participation in or encouragement of activity prohibited by Section 8(b)(4) of the Labor Management Relations Act.
9. Any analysis of the impact of the Board's decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), on any specific industry, including but not limited to, the temporary help industry, the restaurant industry, the fast-food industry, and the construction industry.
10. Any analysis of the impact of the Board's decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), on any specific type of business relationship, including but not limited to, labor user-labor supplier, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, lessor-lessee, parent-subsubsidiary, contractor-consumer.
11. Any analysis of the impact of the Board's decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), on business practices or contractual relationships.

12. All documents created, used or reviewed in relation to the factual assertions in the Notice of Proposed Rulemaking (NPRM) on “The Standard for Determining Joint-Employer Status,” 83 Fed. Reg. 46681 (Sept. 14, 2018), in the paragraph on page 46693 containing footnotes 53 to 54, starting with the third sentence of the paragraph and continuing to the end of the paragraph.

13. All documents created, used or reviewed in relation to the factual assertions in the NPRM on “The Standard for Determining Joint-Employer Status” in the sentences ending with footnotes 53 and 54, including, but not limited to, any such documents that reveal how many of the filing described in those sentences occurred during each year or each month of the described period.

14. Any documents analyzing or addressing the impact of the proposed rule on cases currently pending before the Board or the courts of appeals.

15. Any documents related to the “comprehensive review of its policies and procedures governing ethics and recusal requirements for Board Members” that the Board announced it was undertaking on June 8, 2018.

16. Any documents relating to any consideration of the “ethics and recusal requirements for Board Members” in relation to rule making that was part of the “comprehensive review.”

17. Any documents relating to any consideration of the “ethics and recusal requirements for Board Members” in relation to rule making concerning the joint-employer standard that was part of the “comprehensive review.”

18. Any documents relating to the ethics of any specific current Board Members participating in promulgation of the NPRM on the joint-employer standard.

Fee Waiver

For purposes of determining fees associated with processing our FOIA request, please be advised that the AFL-CIO is an “other” requester under the NLRB Rules and Regulations, Section 102.117(d)(2). Although “other” requesters are charged only for searches and photocopying (with no charge for the first two hours of search time or for the first 100 pages of photocopies), we request that any fees associated with processing our request be waived pursuant to NLRB Rules and Regulations, Section 102.117(d)(2)(vi). Under that section, “[d]ocuments are to be furnished without charge or at reduced levels if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requestor.” *Id.*; 5 U.S.C. § 552(4)(A)(i)).

We address the two requirements applied by the Board to determine whether the AFL-CIO qualifies for a fee waiver: 1) the public interest requirement and 2) whether disclosure of the information is not primarily in the requester's commercial interest.

In relation to the public interest requirement, the requested documents specifically concern identifiable operations or activities of the government. In particular, the requested documents concern the NLRB's recent NPRM on the standard for determining joint-employer status, 83 Fed. Reg. 46681 (Sept. 14, 2018). The requested documents will be used by the AFL-CIO to provide meaningful input in response to the Board's solicitation for comments on the proposed rule. The responsive documents will permit us to provide responsive, relevant and meaningful information to the Board as it considers and determines the appropriate standard for determining joint-employer status and the impact of the proposed rule. The proposed rule will affect the Board's operations and activities such as processing and handling representation petitions and unfair labor practice charges, and the public has a great interest in understanding the scope of the proposed rule's impact, including possible changes in employee and employer rights under the proposed rule.

The AFL-CIO intends to use the requested documents in its response to the Board's NPRM on behalf of its affiliated national and international unions, their local unions, and the employees they represent and who wish to be represented by them. The requested documents will enrich our critical and unique contribution to the Board's deliberations about its NPRM and the public understanding of the NPRM, and we do not seek in any way to further our own "individual" understanding.

In relation to the requested documents not being primarily in our commercial interest, the AFL-CIO has no commercial interest in the documents. We will not trade in the documents or use the documents to further any commercial transactions. We seek the documents *solely* for use in responding to the Board's NPRM process and to assist the Board in developing a standard for determining joint employer status that is consistent with the Act and efficiently advances its purposes. While the information sought is of interest to our affiliated national and international unions and their locals and members, we do not believe that this is the type of commercial interest contemplated by Congress under FOIA. But, even if it is, it is extremely attenuated as attributed to the AFL-CIO in this situation and clearly outweighed by the public interest identified and explained above.

Please let me know if additional information is needed to process our request for documents and a fee waiver. Thank you for your timely attention to this matter.

Sincerely,

/s/Craig Becker

Craig Becker

General Counsel

AFL-CIO